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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1177

HARRY LLOYD MILHAN, *Petitioner*,

v.

MARY LEE MILHAN, *Respondent*.

On Petition for a Writ of Certiorari to The Supreme Court of California

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BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the California Supreme Court is now reported at 528 P.2d 1145.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the petition.

QUESTIONS PRESENTED

1. In a distribution of property following dissolution of a marriage, is the supremacy clause of the

United States Constitution contravened by a judgment of a state court awarding the wife of a retired serviceman an amount of money equivalent to the wife's community property interest in the husband's National Service Life Insurance policies, where the judgment expressly conditions the award upon existence of sufficient community assets aside from the policies and further provides that under no circumstances shall the husband be required to surrender the policies in order to satisfy the wife's claim?

2. Does a state court judgment awarding the wife of a serviceman a community interest in the serviceman's retirement pay frustrate a congressional intent that retirement pay be the separate property of the retiree, immune from claims of the spouse under state community property law?

STATUTE INVOLVED

The statute involved is § 459 of the Social Service Amendments of 1974, Pub. L. No. 93-647 (Jan. 4, 1975). Section 459 is set forth at page 7 of this brief.

STATEMENT

The parties married in 1944 immediately following petitioner's graduation from the United States Naval Academy and lived together as husband and wife during the entirety of petitioner's active service in the military. While in the Navy, the husband obtained two insurance policies, a National Service Life In-

surance policy and a Navy Mutual Aid Association policy, which at the time of trial had a total cash value of approximately $4,500. During his active service in the Navy, petitioner earned retirement pay, which became payable to him in monthly installments upon his retirement in 1965, at which time both parties were domiciliaries of California. The parties separated in 1968 and on May 2, 1972, the trial court entered judgment in a dissolution proceeding, finding that the life insurance policies and the military pay were the separate property of the husband under California community property law. The California Supreme Court entered an opinion filed December 12, 1974, reversing the judgment of the trial court as to both the insurance and the retirement pay. In holding that petitioner's retirement pay was subject to partial distribution to respondent as community property, the court relied on and incorporated its earlier opinion of *In re Marriage of Fithian*, 517 P.2d 449 (Cal. S. Ct.), *cert. denied*, 95 S. Ct. 41 (Oct. 15, 1974).

ARGUMENT

I.

THE OPINION OF THE COURT BELOW DID NOT INTERFERE WITH CONGRESS' INTENT THAT A SERVICEMAN HOLDING A NATIONAL SERVICE LIFE INSURANCE POLICY HAVE THE RIGHT TO CHANGE THE BENEFICIARY UNDER SUCH POLICY.

In *Wissner v. Wissner*, 338 U.S. 655, 70 S.Ct. 398 (1950), an enlisted man, without the knowledge or

consent of his wife, named his mother the principal beneficiary under his National Service Life Insurance (NSLI) policy. After the serviceman's death the Veterans Administration commenced to pay his mother the proceeds of the policy in monthly installments, but his widow filed an action in Superior Court contending that under the community property law of California, the marital domicile, she was entitled to one half the proceeds of the policy on the theory that the insurance premiums had been paid from the husband's army pay, which was community property under California law. The Superior Court held that the proceeds of the insurance policy were community property of the widow and the decedent and required the mother, the named beneficiary, to pay the widow one half the amount of insurance payments already received, plus one half of all future payments. The District Court of Appeals affirmed and the Supreme Court of California denied a hearing.

The United States Supreme Court reversed, holding that California community property law as applied in that case conflicted with § 802(g) of the National Service Life Insurance Act of 1940, 38 U.S.C. § 802[1], which provided that the insured "shall have the right to designate the beneficiary or beneficiaries of the insurance . . . and shall . . . at all times have the right to change the beneficiary or beneficiaries . . . ." The Court stated that the result would be the same whether the state court judgment was directed at the money

[1] This provision is now codified in 38 U.S.C. § 717(a).

which the beneficiary received from the government or an equivalent amount.

In *Wissner* the state court judgment clearly interfered with the rights which the insured intended to confer upon his designated beneficiary. The instant case is distinguishable, because the judgment of the court below did not in any way impair the petitioner's statutory right to designate and to change beneficiaries. Nor did the judgment directly or indirectly affect the interest of present or future beneficiaries under the policies.

Petitioner's statement on page 8 of the petition that he must "now surrender his NSLI policy for its cash value in order to have sufficient funds on which to live" misreads the opinion of the court below. While the court did hold that respondent's community interest in the policies entitled her to an award of one half of their cash value, payable out of the husband's share of community assets other than the policies, it went on to make these critical qualifying statements:

> Provision could be made for husband to discharge this obligation over a period of time if insufficient property exists at the time of dissolution. In no event, however, should husband be ordered to surrender, or otherwise impair, his policies in order to satisfy wife's community claim, for such an order would violate the overriding federal law discussed above.

The clear import of this language is that in the event of a conflict between the wife's community claim and

a serviceman's right to designate and to change beneficiaries as reflected in his beneficiary's right to receive the full proceeds of the policies, the latter right prevails. Thus, if in a particular case an NSLI policy is the sole community asset and the husband does not have enough other property to satisfy the wife's community interest in the policy, the opinion below provides that the husband could be required to make installment payments until the wife received the full extent of her claim. Moreover, were the husband to die or become incapacitated before discharging his obligation, the opinion makes clear that his former wife could not reach the proceeds of the policy or their equivalent as against the beneficiary.

In *Wissner* the judgment of the state court required the beneficiary to pay to the serviceman's widow one half of the proceeds of the policy, thereby limiting the insured's absolute statutory right to designate a beneficiary; in contrast, in holding that a state court cannot (1) award an NSLI policy to the other spouse, (2) deprive the insured of his right to change the beneficiary, or (3) require the insured to surrender the policy in order to distribute to the wife her community share of the cash value of the policy, the court below clearly recognized, and stopped short of impinging upon, the paramount federal right of the beneficiary designated by the insured.

II.

AN EXAMINATION OF THE RELEVANT FEDERAL STATUTES AND THEIR HISTORY DISCLOSES NO

CONGRESSIONAL INTENT TO PROTECT A SERVICEMAN'S RETIREMENT PAY FROM HIS FORMER WIFE'S COMMUNITY INTEREST THEREIN AND, IN FACT, REVEALS A CONTRARY INTENT.

A. Pub. L. No. 93-647 Specifically Authorizes the Attachment of Military Pay for the Purpose of Enforcing a Serviceman's Legal Obligations to Make Child Support and Alimony Payments.

Section 459 of the Social Service Amendments of 1974, Pub. L. No. 93-647 (Jan. 4, 1975) provides:

> Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States (including any agency or instrumentality thereof and any wholly owned Federal corporation) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

Part D of the Act, of which § 459 is a provision, is entitled Child Support and Establishment of Paternity. The legislative history of Part D, which is contained in S. Rep. No. 1356, 93d Cong., 2d Sess. (1974), reveals an acute congressional concern over the burgeoning number of parents who are abandoning their families and dishonoring support obligations. Part D of the Act represents Congress' determination that a

stronger federal role is necessary in order to solve this problem. Section 459 is specifically designed to eliminate pre-existing statutory barriers to collection of pay from military personnel and federal employees. 1974 U.S. Code Cong. & Admin. News, No. 15, at 9207.

Section 459 is directly applicable to the present case, because it shows a clear congressional intent not to immunize federal military pay from valid legal claims of dependents of military personnel. That military retirement pay is included in the term *moneys* as used in § 459, is made clear by the discussion in S. Rep. No. 1356 of a provision similar to § 459 in a prior House Report:

> In 1971, the Administration, commenting on a proposal to permit the attachment of retirement pay of military personnel in connection with court orders for child support or alimony, opposed the proposal as extraneous to the bill being considered but noted:
>
> > "If there is sufficient reason to attach retired pay, the same reason undoubtedly exists for an attachment provision applicable to other Federal pays and annuities. Accordingly, the broader subject of attachment of all Federal pays and annuities for support of dependents may well deserve congressional attention as a matter in its own right. (House Report 92-481, p.24.)"

1974 U.S. Code Cong. & Admin. News, No. 15, at 9217.

H.R. Rep. No. 92-481, which accompanied the Armed Forces Survivor's Benefit Plan, Pub. L. No. 92-425 (September 21, 1972), contained very forceful language which explicitly recognized a former spouse's legitimate interest in retirement pay to satisfy a court decree for alimony and the difficulties often involved in enforcing such a decree against a retiree who can avoid his obligations merely by moving to another jurisdiction:

> During the course of its study, the committee received numerous letters from wives or ex-wives of career military personnel saying that after serving along with their husbands during all or a portion of their husbands' military careers, the marriage had terminated and a divorce action or a suit for separate maintenance had been adjudicated and the court had made a decree for alimony or support money to provide for their care and care of their dependent children. Yet despite such an award by a court of competent jurisdiction, the retirees were not honoring such a court decree. Attempts at court actions to force the retirees to pay the amount awarded by the court are frequently thwarted by a retiree pulling up stakes in the state in which he is being sued and moving to another where legal action must commence again.

H.R. Rep. No. 481, 92d Cong., 1st Sess. 17 (1971). The House Committee stated further: " . . . [W]e believe it is wrong for the United States to protect retired and retiree pay while the military retiree can, for practical purposes, ignore court orders." *Id.* at 18.

In recognition of the right of dependents to court ordered support and alimony and the retiree's obligation to comply with such orders, the committee recommended enactment of a provision which would have authorized the attachment of an amount up to one half of a serviceman's retired pay.

While the attachment provision supported by H.R. Rep. No. 92-481 was ultimately deleted from Pub. L. No. 92-425, the report is nevertheless highly relevant to the instant case in view of its discussion of attachment of military pay in the specific context of retirement pay. That S. Rep. No. 1356, accompanying Pub. L. No. 93-647, incorporated part of H.R. Rep. No. 481's discussion of the attachment of military retired pay definitely indicates a congressional intent to make such pay attachable under § 459. H.R. Rep. No. 92-481 is additionally significant because of its very clear recognition of a wife's right to enforcement of an alimony decree and a retiree husband's obligation to comply with the decree.

Section 459 of the Act, read in conjunction with S. Rep. No. 93-1356 and H.R. Rep. No. 92-481, makes clear that a serviceman's alimony and child support obligations may be satisfied out of his retirement pay. It would seem equally clear that a wife's community interest in retirement pay in a community property state comes within the meaning of *alimony* as used in § 459. It cannot seriously be argued that Congress, in enacting such an expansive provision as § 459, intended to draw a fine distinction between alimony

and community property. While many community property states, including California, also provide for alimony under certain circumstances, the statutorily required division of community assets in many cases obviates the need for alimony awards so that the disposition of community property is the practical equivalent of alimony.

Although it is true that the history of 10 U.S.C. § 6323, the statute which authorizes the husband's retirement pay in the present case, and the predecessors of that statute disclose no congressional intention with regard to the availability of military retirement pay for partial distribution to a spouse in a community property state, § 459 has definitively resolved any uncertainties.

B. The California Supreme Court in In Re Marriage of Fithian, 517 P.2d 449 (1974), Correctly Held that Other Federal Statutes Pertaining to Military Benefits are Inapplicable to the Question of Congressional Intent as to Availability of Military Retirement Pay for Partial Distribution to a Retiree's Spouse as Community Property.

As previously contended, § 459 of Pub. L. No. 93-647 should be held dispositive of this question, but even without § 459, the other statutes which petitioner asserts to be indicative of a congressional intent to treat military retired pay as separate property are clearly irrelevant when examined in context and in light of the legislative history.

Petitioner argues that Congress could not have intended the result reached in the present case in view of the Armed Forces Survivor's Benefit Program, 10 U.S.C. §§ 1447 - 1455, Pub. L. No. 92-425 (Sept. 21, 1972). Under 10 U.S.C. § 1450(b) the annuity of a widow automatically terminates upon her remarriage, whereas under the judgment of the state court in the instant case the former spouse continues to receive her community share of the husband's retirement benefits notwithstanding her remarriage. Petitioner contends that to award a spouse of a serviceman an interest in the latter's retirement pay is inconsistent with congressional intent as manifested in the Armed Forces Survivor's Benefit Program, which specifically provided for widows of retired servicemen but made no mention of ex-wives.

This argument completely ignores the history of the legislation. Indeed, the bill which ultimately became Pub. L. No. 92-425 originally contained a provision, very similar to § 459 of Pub. L. No. 93-647, which specifically authorized the attachment of military retirement pay to comply with a court order in conjunction with divorce or separation proceedings. S. Rep. No. 1089, 92d Cong., 2d Sess. (1972). This provision was eventually stricken from the bill, but only because (1) attachment of retirement pay was considered extraneous to the issue of survivor benefit legislation and (2) it was considered inappropriate to provide for the attachment of the pay of military personnel but no other federal employees. The follow-

ing language from the Senate Report reveals that Congress was not ignoring former spouses but was merely deferring the question for another day:

> The committee is in sympathy with the requirement for investigation of the need for such a provision. The committee felt, however, because of the sensitivity and the administrative complexities of this type of provision, it should be considered in terms of its applicability to all Federal pay and personnel. Since attachment is extraneous to the question of survivor benefit legislation, it is improbable that an attachment provision could be evaluated to the extent appropriate or necessary, and therefore it should be considered separately and on its own merits along with legislation that might require all Federal pays to be subject to attachment.

1972 U.S. Code Cong. & Admin. News, p.3300. This excerpt from S. Rep. No. 92-1089 proved to be an accurate foreshadowing of the enactment of § 459.

Petitioner relies on the legislative history of the Retired Serviceman's Family Protection Plan, Pub. L. No. 90-485 (Aug. 13, 1968), 10 U.S.C. § 1431 et seq., in asserting that Congress intended military retirement pay to be the "personal entitlement" of the retiree. A reading of the legislative materials reveals, however, that the phrase "personal entitlement" was used not to declare military retirement pay the separate property of the retired serviceman but to signify that retirement pay ceases with the death of the serviceman, thus underscoring the need for an

annuity plan to provide for a deceased serviceman's family. This statute was specifically designed to liberalize various provisions of the Retired Serviceman's Family Protection Plan in order to encourage greater participation in the plan. 1968 U.S. Code Cong. & Admin. News, p.3294, 3300; S. Rep. No. 1480, 90th Cong., 2d Sess. (1968). The court in *Fithian* made the persuasive observation that "[i]t is not incongruous for Congress to supply a program to aid widows, who no longer have husbands to provide sustenance, and omit to do so for ex-wives who can rely on state family law concepts of support, alimony, and community property for a source of income." 517 P.2d at 454.

Moreover, that Congress provided for automatic termination of an annuity upon divorce, 10 U.S.C. § 1431(c), does not support petitioner's argument that Congress intended to isolate military retirement pay from valid claims of divorced spouses. Since an annuity under the program becomes available only upon death of the serviceman, Congress likely was attempting to prevent a windfall to a former spouse who presumably had already received an equitable share of the community property upon dissolution of the marriage.

10 U.S.C. § 2771 authorizes a serviceman to designate a beneficiary to receive any arrearages in pay which are due but unpaid at his death. The statute affects distribution of only that retirement pay, if any, which was due the serviceman but which he

failed to collect before his death; it cannot reasonably be read to express a congressional intent to preclude the states from classifying retirement pay as community property. The *Fithian* court distinguished the insurance program in *Wissner*, "in which the right to choose a beneficiary was an integral and explicit part of the federal plan," from § 2771, which constitutes "no more than a contingency procedure to distribute whatever money, if any, is due to the serviceman but which he failed to collect." 517 P.2d at 455. It cannot persuasively be argued that Congress intended the designation right under § 2771 to be central to the whole military retirement system and to foreclose the states from characterizing retirement pay as community property. In any event, § 459 clearly makes the right to designate under § 2771 subordinate to a wife's right to enforce an alimony decree against retirement pay and limits the operation of § 2771 to retirement pay, if any, which remains after child support, alimony, and community property decrees have been satisfied.

C. Examined in Context, Decisions of the Court of Claims Holding Retirement Pay to be Compensation for a Retiree's Availability for Recall to Active Service are Inapplicable to a State's Characterization of Military Retirement Pay as Community Property.

Petitioner argues that because § 3105 of Title 38, U.S.C. enables disabled servicemen to waive all or part of their retirement pay and receive instead Vet-

erans Administration pensions, which have been labeled gratuities by federal courts, *Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840 (1934), retirement pay, convertible to a gratuity, cannot be community property under California community property law. First of all, federal courts have uniformly classified retirement pay as earned money rather than a gratuity. *Berkey v. United States*, 361 F.2d 983 (Ct. Cl. 1966); *Gordon v. United States*, 140 F. Supp. 263 (Ct. Cl. 1956); *Lemly v. United States*, 75 F. Supp. 248 (Ct. Cl. 1948). Thus retirement pay is clearly an earned entitlement at least until the point of actual conversion. Further, under California law, pensions as well as retirement pay are community property. *In Re Marriage of Fithian*, 517 P.2d at 455. To give effect to the state's treatment of pensions as community property does not conflict with the characterization of pensions as gratuities by federal courts, because the factual contexts in which the federal cases were decided make those cases inapplicable to the present case. In *Lynch* the Court was discussing pensions as gratuities in the context of the question whether pensions, so long as they are not vested, are subject to redistribution or withdrawal by Congress at any time. In *Lemly* the Court of Claims distinguished pensions from retirement pay on the narrow question whether the court had jurisdiction over the claim presented.

Petitioner argues alternatively that even if retirement pay is an earned, not gratuitous, benefit, it is

compensation for the retiree's continuing availability for possible recall to service rather than payment for service already rendered so that any amounts paid the husband following the divorce are his separate property. As stated above, in *Lemly* the Court of Claims distinguished pensions from retirement pay in the limited context of the Court of Claims' jurisdiction. That court has jurisdiction over claims for retirement pay, but not claims for pensions; in *Lemly* the court found that retirement pay is a continuation of active pay on a reduced basis intended to compensate the retired serviceman for his availability to recall to active duty and that therefore the court had jurisdiction of the claim. The distinction between military retirement pay and pensions drawn by the Court of Claims in *Lemly* occurred in a narrow jurisdictional context and cannot logically be deemed controlling in the far different context of classification of retirement pay under state community property law. Petitioner also cites *Hostinsky v. United States*, 292 F.2d 508 (Ct. Cl. 1961), in support of the contention that retirement pay compensates the retiree's availability for future service rather than performance of past duties. *Hostinsky* involved the limited question of the applicability of 5 U.S.C. § 62, which prohibits any person who holds a federal office with an annual compensation greater than $2,500 from simultaneously holding another office, to a retired naval officer who while on retired status served as a fire and damage control superintendent with the

Maritime Administration of the Department of Commerce. The Court of Claims decided only that for the purposes of this statute the retired officer was still a member of the Navy with certain limited duties. The court did not address the question whether retirement pay compensates the serviceman for past or present services. Moreover, in *Gordon v. United States*, 140 F. Supp. 263 (Ct. Cl. 1956), the Court of Claims described retirement pay as an award to servicemen "for the reason that it is something they earned while in the service of their country . . . ." 140 F. Supp. at 264; *see Berkey v. United States*, 361 F.2d 983, 987 n.9 (Ct. Cl. 1966).

Despite any language in prior decisions of the Court of Claims indicating that retirement pay is compensation for present rather than past services, § 459 of Pub. L. No. 93-647 shows clear congressional intent that retirement pay is subject to attachment on behalf of an ex-wife to enforce an alimony decree; thus, regardless of the characterization of military retirement pay, Congress has expressly declared that such pay is available for enforcement of support and alimony decrees.

D. The Decision of Wissner v. Wissner, 338 U.S. 665, 70 S.Ct. 398 (1950), Is Inapplicable to the Question Whether Congress Intended Military Retirement Pay to be Treated as Separate Property of the Retiree.

Wissner involved construction of a specific statute in the light of Congress' purpose in enacting it. Yet

petitioner derives from *Wissner* a five part test which, it is contended, determines whether Congress intended a particular federally conferred property right to be immune from community property classification by the states. The "*Wissner* test" is set out at page 10 of the petition. The first and fifth criteria, that the benefits be intended to directly enhance the morale of servicemen and afford maximum material protection, are drawn from the Supreme Court's discussion in *Wissner* of an argument advanced against the constitutionality of the National Service Life Insurance Act. The Court discussed the other three criteria only as particular characteristics of the National Service Life Insurance program. The test was not articulated by the Court but rather was artificially constructed by the petitioner by paraphrasing a series of statements by the Court taken out of context and grouped together.

In any event, any general relevance *Wissner* might have to the question of the susceptibility of military retirement pay to community property classification is clearly superseded by § 459 of Pub. L. No. 93-647, which makes military pay subject to the enforcement of alimony and support decrees.

CONCLUSION

For the reasons stated above, Respondent says that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter J. Boyd, the attorney for respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 28 day of April, 1975, I served three copies of this brief on petitioner by mailing the same in a duly addressed envelope, with airmail postage prepaid, to the attorneys for petitioner, Gary R. Ricks, Esq. and J. Terry Schwartz, Esq., 200 East Carrillo Street, P.O. Box B-B, Santa Barbara, California 93102.

Peter J. Boyd

Peter J. Boyd